IN THE

Supreme Court of the United States

October Term, 1960

No.

HERBERT E. NELSON and WALLACE R. NELSON,

Petitioners

v.

SIERRA CONSTRUCTION CORPORATION,
a Nevada corporation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

MORTON GALANE,
Counsel for Petitioners
Stearns Building,
Las Vegas, Nevada

INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Question Presented	5
Statutes and Constitutional Provisions Involved	6
Statement	6
Reasons for Granting the Writ	7
Conclusion	12
APPENDICES:	
APPENDIX A—Statutes and Constitutional Provision Involved	1
APPENDIX B-1—Oral Decision of Eighth Judicial District	3
APPENDIX B-2—Opinion of Supreme Court of the State of Nevada	5
APPENDIX B-3—Order of Supreme Court of State of Nevada Denying the Hearing	12
APPENDIX C—Certificate of Secretary of State of the State of Nevada	13

TABLE OF AUTHORITIES CITED

Cases

Brinkerhoff-Faris Trust Sav. Co. v. Hill, 281 U. S. 673, 678	5
Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U. S. 358, 366	3, 5
Hanson v. Denckla, 357 U. S. 235, 249-250	8
Herndon v. State of Georgia, 295 U. S. 441	5
Kernan v. American Dredging Co., 355 U. S. 426, 444	11

PAGE

Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313, 320 5

Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U. S. 74, 79 5

Saunders v. Shaw, 244 U. S. 317, 320 5

Shore Line Oil Co. v. King, 68 Nev. 183, 228 P. 2d 395 2

Standard Oil Company v. New Jersey, 341 U. S. 428 8

Tidal Oil Company v. Flanagan, 263 U. S. 444, 454, 455 ..... 4, 5

Statutes

Laws 1945, Chapter 188 ..... 2, 12

NRS 79.050 6

NRS 79.140 6

NRS 79.170 ..... 4, 5, 6, 7

NRS 79.230 6

NRS 79.240 6

Uniform Stock Transfer Act, Section 1 ..... 9, 10

Uniform Stock Transfer Act, Section 10 10

Uniform Stock Transfer Act, Section 13 ..... 4, 5, 7, 8, 9, 10, 11

United States Constitution, Fourteenth Amendment 5

Miscellaneous

"Attachment of Corporate Stock", 73 Harv. L. Rev. 1579, 1589-1591 ..... 8, 11

Certificate of the Secretary of State of Nevada 13

Stocking & Watkins, "Monopoly and Free Enterprise" (The Twentieth Century Fund, 1951), pages 442-443 12

IN THE

Supreme Court of the United States

October Term, 1960

No.

HERBERT E. NELSON and WALLACE R. NELSON,
Petitioners,

v.

SIERRA CONSTRUCTION CORPORATION,
a Nevada corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

To the Honorable Earl Warren, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

Herbert E. Nelson and Wallace R. Nelson, petitioners herein, pray that a writ of certiorari issue to review the judgment of the State of Nevada, entered May 16, 1960, Petition for Rehearing, denied June 3, 1960.

Citations to Opinions Below

The opinion of the Eighth Judicial District Court, Clark County, State of Nevada, is printed in Appendix B hereto, *infra*, p. 3. The opinion of the Supreme Court of the State of Nevada is printed in Appendix B hereto, *infra*, p. 5, and is reported in 352 P. 2d 115. The order of the Supreme Court of the State of Nevada denying rehearing without opinion is printed in Appendix B hereto, *infra*, p. 12.

Jurisdiction

The Federal constitutional question was first raised in the petition for rehearing, because it was the judgment itself rendered by the Supreme Court of the State of Nevada, as indicated by the opinion, which reached outside the territorial jurisdiction of the state to divest the petitioners of their title to shares of corporate stock which petitioners contend was not subject to the court's control.

The trial court, in its opinion refusing to grant a motion by petitioners to quash the levy of a writ of attachment and to dissolve the attachment, had previously made a determination divesting petitioners of their title to the stock: "I think now the stock belongs to the Nevada Savings and Loan Association." However, the trial court, as is obvious from the face of its opinion, presupposed the existence of jurisdictional facts upon which to validly predicate its determination.

The appeal to the Supreme Court of the State of Nevada was, therefore, directed to a reversal of those facts upon which the trial court had based its conclusion that "now the stock belongs to the Nevada Savings and Loan Association". There was no reason to raise a Federal constitutional question. Almost ten years before the Supreme Court of the State of Nevada had recognized, commencing with the Laws 1945, Chapter 188, that certain shares of corporate stock thereafter issued would come within the purview of the Uniform Stock Transfer Act, as enacted in the State of Nevada. *Shore Line Oil Co. v. King* (1951), 68 Nev. 183, 228 P. 2d 395. The question presented by the appeal was confined to state law, involving the adequacy of the evidence to support the factual findings implicit in the trial court's conclusion regarding the transfer of title to the stock from the petitioners to the Nevada Savings and Loan Association. If the petitioners had failed to reverse the implicit findings concerning the character of the shares of stock, then under the state law the trial

court's conclusion would be affirmed. In contrast, if the petitioners had succeeded in demonstrating the applicability of the Uniform Stock Transfer Act to the facts of the case, the state law of Nevada would have impelled reversal.

The Supreme Court of the State of Nevada, however, made an unexpected departure from the issues presented by the appeal. Having been presented with a verified motion, entitled "Special appearance by defendant for a motion to dissolve, vacate and discharge the attachment and garnishment purportedly levied by service on Nevada Savings and Loan Association on October 19, 1959", which stated that petitioners resided in the State of California and the Sheriff had failed to seize any of the stock certificates and the certificates had not been surrendered to Nevada Savings and Loan Association and their transfer by the holder had not been enjoined, it was obvious from the record that the stock certificates in question were physically outside of the territorial jurisdiction of the State of Nevada. The Supreme Court then created its own record of jurisdictional facts out of "what is in essence the stipulation of counsel followed by the acquiescence of the court". *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 366.

Specifically, the comment was as follows:

> "On the oral argument herein, counsel for respondent conceded that the purported levy on the stock was ineffectual because the stock certificates were not seized by the officer making the levy or surrendered to Nevada Savings and Loan Association which issued it, or the holder had not been enjoined, *as required by NRS 79.170* * * *." (Emphasis supplied.)

Thus, the Supreme Court of the State of Nevada added a new setting in which to exercise its appellate jurisdiction, to wit:

(1) The shares of corporate stock in question were embodied in certificates governed by Section 13 of the Uniform Stock Transfer Act, identified in Nevada as NRS 79.170.

(2) The certificates were physically outside the territorial jurisdiction of the State of Nevada.

(3) The stock certificates were not seized pursuant to writ or process issued by any court of the State of Nevada.

(4) The stock certificates were not surrendered to Nevada Savings and Loan Association, which issued it.

(5) The holders had not been enjoined from transferring the certificates by any court of the State of Nevada.

Such a context in which to review a determination effecting a transfer of title to the shares certainly provoked a serious question whether there existed a jurisdictional predicate for the determination.

The opinion of the Supreme Court of the State of Nevada apparently perceived no obstacle, for it concluded that the evidence was sufficient to support the lower court's conclusion that Nevada Savings and Loan Association was the owner of the stock.

It was the opinion of the Supreme Court of the State of Nevada which set out the jurisdictional facts provoking the question whether divestiture of the petitioners' title to the stock was in excess of the court's jurisdiction over the subject matter. The opinion of the trial court invited no such challenge, with its obvious dependency on what the trial court deemed to be the applicable state law. Therefore, the Federal constitutional right alleged to have been violated found its genesis in the judgment of the state supreme court. "The question * * * could not well be raised until the handing down of the opinion indicating that the objectionable judgment was to follow." *Tidal Oil Company v. Flanagan*, 263 U. S. 444, 454, 455.

Certiorari jurisdiction of the Supreme Court of the United States is invoked, not in disregard of the general rule that the Federal question must have been raised in the state court before decision or must have actually been entertained and considered upon the petition for rehearing, but in reliance upon a well recognized exception to the general rule, namely: an alleged violation of the Federal constitutional right by the judgment of the state supreme court itself. *Brinkerhoff-Faris Trust Sav. Co.* v. *Hill*, 281 U. S. 673, 678; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 320; *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.*, 281 U. S. 74, 79; *Saunders* v. *Shaw*, 244 U. S. 317, 320; *Tidal Oil Company* v. *Flanagan*, *supra*; *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, *supra*; see *Herndon* v. *State of Georgia*, 295 U. S. 441.

The Supreme Court of the State of Nevada is the highest court of law or equity in the State of Nevada from which a final decision could be had in these matters herewith presented.

Question Presented

Whether the Nevada courts were without the jurisdiction required by the due process clause of the Fourteenth Amendment of the United States Constitution to enter a judgment transferring title to shares of stock subject to Section 13 of the Uniform Stock Transfer Act (NRS 79.170), since the stock certificates were physically outside of the territorial jurisdiction of Nevada, had not been seized pursuant to writ or process issued by any court of Nevada, were not surrendered to the Nevada corporation which had issued them and the holders had not been enjoined from transferring the certificates by any court of Nevada.

Statutes and Constitutional Provisions Involved

The statutes of the State of Nevada involved herein are NRS 79.050, NRS 79.140, NRS 79.170, NRS 79.230 and NRS 79.240.

The constitutional provision involved is Article XIV of the Amendments to the Constitution of the United States.

Said statutes and constitutional provision are set out in Appendix A hereto, *infra*, pp. 1 to 2.

Statement

Respondent herein commenced two separate actions against petitioners in the District Court of the State of Nevada, in and for the County of Clark. In both actions respondent served a writ of attachment upon a third party, Nevada Savings and Loan Association.

Nevada Savings and Loan Association had originally issued shares of stock to the petitioners; and prior to the commencement of the litigation petitioners had offered to sell their stock to Nevada Savings and Loan Association. During the course of the litigation the stock certificates were physically in the State of California outside of the territorial jurisdiction of the State of Nevada. Nevertheless, Nevada Savings and Loan Association accepted the offer to sell, but refused to pay the purchase price to the petitioners as a result of the service of a writ of attachment upon the corporation. Petitioners presented motions in both actions directed toward the dissolution of the levy of attachment.

The trial court deemed the purchase money attachable upon the theory that title to the stock was vested in Nevada Savings and Loan Association by transfer of the stock on their books. Petitioners took appeals in both actions from the orders refusing to dissolve the attachment.

The Supreme Court of the State of Nevada affirmed the trial court's conclusion that title to the stock had been transferred from petitioners to Nevada Savings and Loan Association.

However, the Supreme Court of the State of Nevada also acquiesced in a concession by counsel for respondent during oral argument, which resulted in the following jurisdictional facts furnishing a predicate for the question whether jurisdiction existed for the determination affecting title to the stock:

(1) The shares of corporate stock in question were embodied in certificates governed by Section 13 of the Uniform Stock Transfer Act, identified in Nevada as NRS 79.170.

(2) The stock certificates were not seized pursuant to writ or process issued by any court of the State of Nevada.

(3) The stock certificates were not surrendered to Nevada Savings and Loan Association, which issued it.

(4) The holders had not been enjoined from transferring the certificates by any court of the State of Nevada.

(5) The stock certificates were physically outside of the territorial jurisdiction of the State of Nevada.

Petitioners claimed that the opinion handed down by the Supreme Court of the State of Nevada indicated that a judgment would follow divesting petitioners of legal title to their stock in violation of a Federal constitutional right and that the Federal question could not well be raised until the opinion was rendered. Petition for rehearing was filed raising the Federal question. It was denied without opinion.

Reasons for Granting the Writ

The Supreme Court of the State of Nevada has by its judgment raised a Federal question in a way probably not in accord with applicable decisions of this Honorable Court.

This Honorable Court has recently expressed its concern with the situs of intangibles for the purpose of determining the existence of state jurisdiction over the subject matter. In *Hanson* v. *Denckla*, 357 U. S. 235, 249-250, it was stated:

> "Nearly a century has passed without this Court being called to apply that principle to an in rem judgment dealing with property outside the forum State. The invalidity of such a judgment within the forum State seems to have been assumed and with good reasons. Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction."

Prior thereto, this Honorable Court has had occasion to determine the situs of abandoned stock dividends for the purpose of escheat jurisdiction. See *Standard Oil Company* v. *New Jersey*, 341 U. S. 428.

Neither case ruled on the precise question presented in this petition, but they do evidence the importance of determining the existence or absence of those "affiliating circumstances" without which the courts of a state may not enter a judgment affecting interests in property (jurisdiction in rem or quasi in rem). See *Hanson* v. *Denckla*, *supra*; 357 U. S. at 246.

However, in the June 1960 issue of Harvard Law Review, an article entitled "Attachment of Corporate Stock", 73 Harv. L. Rev. 1579, 1589-1591, has discussed Section 13 of the Uniform Stock Transfer Act as a predicate for *quasi in rem* jurisdiction in the following manner:

> "Corporate shares may provide the basis for quasi in rem jurisdiction in cases involving determination of title to shares, claims unrelated to shareholding, and voting rights. Unfortunately, not a single state that has adopted section 13 of the USTA

appears to have explicitly differentiated among these categories for purposes of jurisdiction. It has been contended that this failure to differentiate is deliberate, and that the Uniform Act's language manifests a specific intent to deprive courts of jurisdiction when the certificate is not subject to their control in all cases where title to the share may be affected. The 'attachment' clause of section 13 does appear to preclude jurisdiction in those cases which necessitate actual attachment of the share because they are unrelated to any property in the jurisdiction. A legislative intent also to prohibit suits designed to resolve conflicting title claims to a share, has been sought in the last sentence of section 13, which states that, except where a certificate is lost or destroyed, the corporation cannot be compelled to issue a new one until the old is surrendered to it, and in section 1's statement that title to a certificate and to the shares represented thereby can be transferred only by delivery of the certificate.

On close examination, neither section seems to require this extensive rejection of jurisdiction. The court's inability under section 13 to compel corporate issuance of a new certificate does not render the assumption of jurisdiction futile, since limited relief can still be provided for the plaintiff by transferring to him all the incidents of share ownership, including the right to receive dividends, subject to divestment by a bona fide purchaser of the certificate. Moreover, a default judgment, if used by a forum in the defendant's state as the basis for issuance of a surrender order, would eventuate in receipt of a new certificate. If this limited assistance amounts to transfer of title to the share by the court at the corporate domicile, it might seem precluded by section 1. But the accompanying Commissioners' Note to that section states that it merely codifies the prior law. The prior law protected bona fide purchases of the certificate on the theory that an assignee of the share was estopped to assert his title against a bona fide transferee of the certificate, because he could have averted the transfer by requiring delivery of the certificate. Section 1, read in conjunction with sec-

tion 10, achieves the same result with a new theory: that separate assignment of the share merely conveys an equitable right which can be cut off by transfer of the certificate in which legal title is merged. Neither the old law nor sections 1 and 10 prevent the transfer of some interest in the share without concomitant transfer of the certificate. They simply subject the interest to the divestment at the hands of a bona fide purchaser of the latter.

A more persuasive argument for preclusion of jurisdiction in suits to establish title to shares may be grounded solely on the interrelation of the two provisions of section 13. If the limited assistance available to plaintiffs despite the last sentence of section 13 is thought of as effecting transfer of title to the share, it might seem prohibited by the 'attachment' clause of the section, since a transfer of title appears to connote seizure of the *res*. On the other hand, a distinction might be drawn between the court's shifting title after suit in order to satisfy the judgment and merely determining—in the type of case under consideration—the location of title as of the time of litigation. Although standing alone this distinction seems little more than a semantic quibble, it gains substantial support from the thrust of section 8, which appears to presuppose the jurisdiction of corporate-domicile forums over suits to try title to the share in providing that a bona fide transferee of a certificate will prevail despite a prior invalidation of his transferor's title. Assumption of jurisdiction in this category of cases might possibly be justified on the theory that it seems directly analogous to actions seeking determination of title to land, which do not require seizure of the *res* because of its immovability. The share in some measure partakes of that quality of immovability."

We quote from the article not for the purpose of persuading this Honorable Court to rule in favor of the petitioner upon the merits, but merely to stimulate the Court's interest in hearing a full presentation of argument.

The issue involves a statute which has been uniformly adopted practically on a nationwide basis. As stated by

Mr. Justice Frankfurter in *Kerian v. American Dredging Co.*, 355 U. S. 426, 444:

> "Such questions of construction are among the most important issues for final determination by this Court."

Section 13 of the Uniform Stock Transfer Act is embodied in the legislation of all the states except Alaska, California, Colorado, Delaware, Florida, Georgia, Kansas, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, Oklahoma and Vermont. See "Attachment of Corporate Stock", 73 Harv. L. Rev. 1579 (1960).

Section 19 of the Uniform Transfer Act (NRS 79.230) reads: "This act shall be interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it."

Clearly, we are propounding a Federal constitutional question which invites determination by the United States Supreme Court.

The petitioners represent a class of stockholders throughout the nation whose certificates are located outside of the territorial jurisdiction of the State of Nevada, but whose title to the shares may be determined by the courts of Nevada on the basis of corporate domicile in Nevada without control over the certificate having been acquired pursuant to Section 13 of the Uniform Stock Transfer Act.

The Supreme Court of the State of Nevada has by its judgment informed certificate-holders of Nevada corporations, no matter where they may hold physical possession of the certificates, that legal title to the shares of stock may be divested without physical control of the certificates pursuant to the requirements of Section 13 of the Uniform Stock Transfer Act.

Stockholders of Nevada corporations, who are holding certificates throughout the nation, deserve an answer whether this judgment of divestiture can remain final without infringement of the Federal Constitution. The State of Nevada is recognized as a domicile of many corporations whose stockholders are distributed in other states. See Stocking & Watkins, "Monopoly and Free Enterprise" (The Twentieth Century Fund, 1951), pages 442-443. The Certificate of the Secretary of State of the State of Nevada, set forth in Appendix C hereto, *infra*, p. 13, shows the substantial number of Nevada corporations which have been organized since the adoption of the Uniform Stock Transfer Act, Laws 1945, Chapter 188.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON GALANE,
Counsel for Petitioners.

APPENDIX A

Article XIV, of the Amendments to the Constitution of the United States, which reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

79.050 How title to certificates and shares may be transferred. Title to a certificate of and to the shares represented thereby can be transferred only:

1. By the delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby; or

2. By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specific person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or bylaws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corpo-

ration or shall be registered by a registrar or transferred by a transfer agent.

79.140 Ineffectual attempt to transfer amounts to a promise to transfer. An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation, if any, imposed by such promise shall be determined by the law governing the information and performance of contracts.

79.170 No attachment or levy upon shares unless certificate surrendered or transfer enjoined. No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it.

79.230 Interpretation shall give effect to purpose of uniformity. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

79.240 Application of chapter to certificates issued after July 1, 1945. The provisions of this chapter apply only to certificates issued after July 1, 1945.

APPENDIX B-1

(Oral Decision of Eighth Judicial District)

IN THE

EIGHTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

Nos. 96133 and 99495

SIERRA CONSTRUCTION CORPORATION, a Nevada Corporation,
Plaintiff,

vs.

HERBERT E. NELSON and WALLACE R. NELSON,
Defendants.

I think the argument is highly technical. I think the transaction by the letters is a closed transaction. I think now the stock belongs to the Nevada Savings and Loan Association. I think they would have a right to transfer that stock on their books whether they had actual possession of the stock certificate or not.

I think when the Nelsons made that offer to sell the stock to the Nevada Savings and Loan Association and Nevada Savings and Loan Association has by Resolution on their minutes accepted it that transaction became closed.

The only difference would be the payment of the money. So, they wrote a check but they could not pay the money because it was attached; so, inasmuch as it was a closed transaction I think the money was attachable.

Now, the next question is whether or not the writ of attachment contains a sufficient allegation as to owing the debt and I think it is a rule you have to comply with the law in every respect.

The law is highly technical. I think the Association holds the money now that belongs to the Nelsons.

I cannot see any sufficient grounds to discharge or dissolve the attachment.

Was the writ improperly issued? I don't think so.

Was the property levied upon exempt from execution? There was nothing shown as to an exemption.

Was the levy excessive? Nothing was shown.

So the motion to quash the levy or writ of attachment and the motion to dissolve and vacate and discharge the attachment and garnishment purportedly levied by service on Nevada Savings and Loan Association be denied.

APPENDIX B-2

(Opinion of Supreme Court of the State of Nevada)

IN THE

SUPREME COURT

OF THE STATE OF NEVADA

—o—

HERBERT E. NELSON and WALLACE R. NELSON,
Appellants,

v.

SIERRA CONSTRUCTION CORPORATION, a Nevada Corporation,
Respondent.

—o—

Nos. 4262 and 4263

[Filed May 16, 1960]

Appeals from the Eighth Judicial District Court, Clark County; A. S. Henderson, Judge, Department No. 2.

Affirmed on both appeals.

MORTON GALANE, of Las Vegas, for Appellants.

MORSE, GRAVES and COMPTON and JAMES H. PHILLIPS, of Las Vegas, for Respondent.

OPINION

By the Court, McNAMEE, C. J.:

Two cases of the same title have been consolidated for oral argument on appeal. The questions involved pertain to each case except as hereinafter noted.

Appeal is from an order refusing to dissolve an attachment.

In case number 4262 the court had personal jurisdiction over appellants by reason of their appearance in said action. They made the following three motions in the court below:

1. Motion to quash the levy of a writ of attachment, filed October 5, 1959;

2. Motion to dissolve, vacate, and discharge the attachment and garnishment purportedly levied by service on Nevada Savings and Loan Association on April 15, 1959, filed October 22, 1959;

3. Motion to dissolve, vacate, and discharge the attachment and garnishment purportedly levied by service on Nevada Savings and Loan Association on October 19, 1959, filed October 22, 1959.

The grounds for motion number 1 were (a) the sheriff failed to serve upon the Nevada Savings and Loan Association a notice that the debts owing by it to appellants or the credits or other personal property in possession or under its control belonging to the defendants were attached in pursuance of said writ as required by subsection 4 of NRS 31.060; (b) the sheriff failed to serve upon the Nevada Savings and Loan Association a notice stating the stock or interest of the defendants was attached in pursuance of the writ of attachment as required by subsection 3 of NRS 31.060; (c) the sheriff failed to actually seize stock certificates, and the certificates had not been surrendered to Nevada Savings and Loan Association and their transfer by the holder had not been enjoined as required by NRS 79.170; (d) the contract whereby Nevada Savings and Loan Association would pay cash for the stock of the defendants was not attachable.

The grounds for motion number 2 were (a) the amount payable to appellants by Nevada Savings and Loan Association under contract contemplates a cash transaction not

a debtor-creditor relationship and was not subject to attachment and garnishment; (b) the sheriff in serving the writ of attachment on Nevada Savings and Loan Association failed to accompany it with any notice that the debts owing by it to the appellants or the credits or other personal property in its possession or under its control belonging to the defendants were attached in pursuance of said writ of attachment; (c) the sheriff served a writ of attachment to Nevada Savings and Loan Association but failed to accompany it with any notice stating that the stock or interest of the defendants was attached in pursuance of said writ of attachment; (d) the sheriff failed to actually seize any of the stock certificates and the certificates had not been surrendered to the Nevada Savings and Loan Association and their transfer by the holder have not been enjoined; (e) Marilynn D. Nelson and Mary Virginia Nelson were not joined as parties defendant in the main action and the records of the Nevada Savings and Loan Association indicate that they have an interest as joint tenants in the stock purportedly levied upon.

The grounds for motion number 3 were (a) the amount payable by Nevada Savings and Loan Association under contract contemplates a cash transaction not a debtor-creditor relationship and is not subject to attachment and garnishment; (b) the sheriff failed to actually seize any of the stock certificates and the certificates had not been surrendered to Nevada Savings and Loan Association and their transfer by the holder had not been enjoined; (c) Marilynn D. Nelson and Mary Virginia Nelson were not joined as parties defendant in the main action and the records of the Nevada Savings and Loan Association indicate that they have an interest as joint tenants in the stock purportedly levied upon.

In case number 4263 appellants were not personally served in this action and entered no general appearance therein. By special appearance they filed a motion to dissolve, vacate, and discharge the attachment and garnish-

ment purportedly levied by service on Nevada Savings and Loan Association on October 19, 1959.

The grounds for the motion in this case were (a) the amount payable to appellants by Nevada Savings and Loan Association under contract contemplated a cash transaction not a debtor-creditor relationship and is not subject to attachment or garnishment; (b) the sheriff failed to actually seize any of the stock certificates and the certificates had not been surrendered to Nevada Savings and Loan Association and their transfer by the holder had not been enjoined; (c) Marilynn D. Nelson and Mary Virginia Nelson were not joined as parties defendant in the main action and the records of the Nevada Savings and Loan Association indicate that they have an interest as joint tenants in the stock purportedly levied upon.

The three motions in case number 4262 and the one motion in case number 4263 were consolidated for argument in the lower court and all four motions were denied on October 26, 1959 and a written order to this effect was filed in the cases. Appeal in each case is from "the order refusing to dissolve an attachment made and entered on the 26th day of October 1959."

The statutory grounds for discharge of attachment are found in NRS 31.200 which reads as follows:

"1. The defendant may also, at any time before trial, apply upon motion, upon reasonable notice to the plaintiff, to the court in which the action is brought or to the judge thereof, for a discharge of the attachment on the following grounds:

(a) That the writ was improperly issued.

(b) That the property levied upon is exempt from execution.

(c) That the levy is excessive.

"2. If the court or the judge thereof on the hearing of such motion shall find that any of the grounds stated

in subsection 1 exist, the attachment and levy thereof shall be discharged. If the motion is based upon paragraph (c) of subsection 1 only, and the same is found to exist, the discharge of attachment shall be only as to the excess."

It is apparent from the foregoing that none of the grounds stated in appellants' several motions for discharge of attachment was one of the statutory grounds specified in NRS 31.200. Each of the grounds upon which the motions were based pertains to the improper levy of the writ as distinguished from an improper issue thereof.

The record on appeal does not contain any of the proceedings which took place at the hearing on said motions other than the oral decision of the court wherein the learned judge thereof stated:

"I think the argument is highly technical. I think the transaction by the letters is a closed transaction. I think now the stock belongs to the Nevada Savings and Loan Association. I think they would have a right to transfer that stock on their books whether they had actual possession of the stock certificate or not.

"I think when the Nelsons made that offer to sell the stock to the Nevada Savings and Loan Association and Nevada Savings and Loan Association has by Resolution on their minutes accepted it that transaction became closed.

"The only difference would be the payment of the money. So, they wrote a check but they could not pay the money because it was attached; so, inasmuch as it was a closed transaction I think the money was attachable.

"Now, the next question is whether or not the writ of attachment contains a sufficient allegation as to owing the debt and I think it is a rule you have to comply with the law in every respect.

"The law is highly technical. I think the Association holds the money now that belongs to the Nelsons.

"I cannot see any sufficient grounds to discharge or dissolve the attachment.

"Was the writ improperly issued? I don't think so.

"Was the property levied upon exempt from execution? There was nothing shown as to an exemption.

"Was the levy excessive? Nothing was shown.

"So the motion to quash the levy or writ of attachment and the motion to dissolve and vacate and discharge the attachment and garnishment purportedly levied by service on Nevada Savings and Loan Association be denied."

What evidence was considered by the court, if any at all, in support of or in opposition to the grounds upon which appellants' motions were based does not appear from the record. We have only the court's bald statement in said decision, to wit, "I cannot see any sufficient grounds to discharge or dissolve the attachment."[1]

Whether it would have been proper for the court below on a motion for discharge of attachment to grant a discharge on grounds other than the three statutory grounds is a question unnecessary for us to decide on these appeals. The court refused to grant the motions and nothing appears in the records on appeal from which this court can determine that error was committed.

---

[1] The opening sentence of the quoted oral decision of the district judge indicates that the decision was rendered immediately following oral argument—and apparently immediately following the reply argument of the movant. What preceded the argument is left to conjecture. Under Rule 20 of the District Court Rules, regulating procedure on motions, the moving party reads his moving papers or introduces oral evidence. The party opposing reads his opposing papers or introduces his oral evidence. The moving party then proceeds in like manner in rebuttal. Counsel then make their respective arguments. Not only was the hearing of the motions apparently unreported, but the record is devoid of even the clerk's court minutes. Appellants' designation of contents of the record on appeal designates the pleadings, the motions, the orders of court, and "all minutes of court on each and every hearing of any matter or motion concerned herein." Respondent made no counter designation. No minutes appear nor any evidence by way of affidavits or otherwise.

On the oral argument herein, counsel for respondent conceded that the purported levy on the stock was ineffectual because the stock certificates were not seized by the officer making the levy or surrendered to Nevada Savings and Loan Association which issued it, or the holder had not been enjoined, as required by NRS 79.170, but this concession loses significance in view of the lower court's decision that Nevada Savings and Loan Association was the owner of the stock and that the purchase price therefor in the hands of said association at the time of the levy was attachable.

We do not know what evidence was considered by the lower court which resulted in this conclusion and in the absence thereof we must assume that the lower court's conclusion was supported by competent evidence. State ex rel. Lyon v. Lyon, 75 Nev....., 346 P. 2d 709.

The order appealed from is affirmed in each case.

Badt and Pike, JJ., concur.

APPENDIX B-3

(Order of Supreme Court of State of Nevada Denying the Hearing)

IN THE SUPREME COURT OF THE STATE OF NEVADA

—o—

HERBERT E. NELSON and WALLACE R. NELSON,
Appellants,

v.

SIERRA CONSTRUCTION CORPORATION, a Nevada Corporation,
Respondent.

—o—

Nos. 4262 and 4263

MORTON GALANE, of Las Vegas, for Appellants.

MORSE, GRAVES AND COMPTON and JAMES H. PHILLIPS of Las Vegas, for Respondent.

Per Curiam:

Rehearing denied.

Done at Carson City, Nevada, this 3rd day of June 1960.

McNAMEE, C. J.
BADT, J.
PIKE, J.

APPENDIX C

STATE OF NEVADA

DEPARTMENT OF STATE

I, JOHN KOONTZ, the duly elected, qualified and acting Secretary of State of the State of Nevada, do hereby certify that there are on file in this office approximately 10,000 corporations currently in good standing.

I FURTHER CERTIFY that the following is a list of corporations filed during the following years:

1945	395
1946	697
1947	668
1948	662
1949	519
1950	664
1951	589
1952	751
1953	973
1954	1225
1955	1655
1956	1140
1957	1165
1958	1204
1959	1674

now on file and of record in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of State, at my office, in Carson City, Nevada, this 1st day of June A. D. 1960.

JOHN KOONTZ,
Secretary of State.

[GREAT SEAL OF THE STATE OF NEVADA]

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 342

HERBERT F. NELSON and WALLACE R. NELSON,
Petitioners,

v.

SIERRA CONSTRUCTION CORPORATION,
a Nevada Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

MADISON B. GRAVES,
Counsel for Respondent
[illegible] South Fourth Street
Las Vegas, Nevada

INDEX

Citations to Opinions Below .....

Grounds on Which Jurisdiction is Invoked .....

Statement of the Facts .....

Argument .....

Question Presented .....

Conclusion .....

APPENDICES:

Appendix A—Statutes and State Court Rules Involved .....

Appendix B-1—Oral Decision of Eighth Judicial District .....

Appendix B-2—Opinion of Supreme Court of the State of Nevada .....

Appendix B-3—Order of Supreme Court of State of Nevada Denying the Hearing .....

TABLE OF AUTHORITIES CITED

Cases

Atlantic Coast Line Rail Road Company v. Lizzie M. Mims, 242 U. S. 532, 61 L. Ed. 476 .....

John v. Paullin, 231 U. S. 381, 383 .....

Matheson v. State Bank of Alabama, 48 U. S. 260, 12 L. Ed. 692 .....

Nickel v. Cole, Nickel v. State of Nevada, 256 U. S. 222, 65 L. Ed. 901 .....

Polizzi v. Cowles Magazines, Inc., 345 U. S. 663, 97 L. Ed. 1331 .....

PAGE

Shelley v. Kraemer, 334 U. S. 1, 92 L. Ed. 1161 6

Tidal Oil Company v. Flanagan, 263 U. S. 444 7

Wabash Railway Company v. City of St. Louis, 64 F. 2d 921; cert. denied 290 U. S. 668, 78 L. Ed. 577 6

Statutes

N. R. S. 31.060 1

N. R. S. 31.200 2

N. R. S. 31.240 2

Miscellaneous

Rule 20, District Court Rules 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 342

HERBERT E. NELSON and WALLACE R. NELSON,
Petitioners,

v.

SIERRA CONSTRUCTION CORPORATION,
a Nevada Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

To the Honorable Earl Warren, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners, Herbert E. Nelson and Wallace R. Nelson, filed herein on the 19th day of August, 1960, with this Honorable Court their Petition for Writ of Certiorari to review the judgment of the Supreme Court of the State of Nevada, entered on May 16, 1960, in two cases with the same title, consolidated for oral argument on appeal in that Court, and also for review of the denial of the petition for rehearing, dated June 3, 1960.

Citations to Opinions Below

The opinion of the Eighth Judicial District Court, Clark County, State of Nevada, in cases No. 96133 and No. 99495, is printed in Appendix B-1 hereto, *infra*, p.——.

The opinion of the Supreme Court of the State of Nevada, cases No. 4262 and No. 4263, consolidated for oral

argument on appeal, is printed in Appendix B-2 hereto, *infra*, p. 6, and which opinion is printed and reported in 352 P2d. 125.

The *per curiam* order of the Supreme Court of the State of Nevada denying rehearing is printed in Appendix B-3 hereto, *infra*, p. 13.

Grounds on Which Jurisdiction is Invoked

The contention of petitioners that the Federal constitutional question was first raised in the petition for rehearing because it was the judgment itself, rendered by the Supreme Court of the State of Nevada, that first raised a Federal constitutional question, is without merit.

A brief statement of the facts in the consolidated cases in question, and the well-established law as applied to these facts, will clearly show that petitioners have no jurisdictional standing before this Honorable Court.

Statement of the Facts

On or about April 7, 1959, petitioners herein, the owners of certain stock in a Nevada association known as Nevada Savings and Loan Association, offered to sell such stock to said association pursuant to the provision that any sale of stock of said association would first be offered to the association itself to repurchase it. On the 15th day of April, 1959, the Board of Directors of Nevada Savings and Loan Association accepted petitioners' offer to sell, and petitioners were so notified by a letter to them under date of April 17, 1959.

On April 15, 1959, respondent herein filed its complaint against petitioners for money due and owing respondent. At the time the complaint was filed, respondent had the Clerk of the Eighth Judicial District Court of the State of Nevada issue a writ of attachment, which the sheriff of Clark County, Nevada, received on the 15th day of April, 1959. The sheriff's return showed that the writ was levied

upon those certain shares of stock of petitioners and was filed May 29, 1959. The April 17, 1959, letter referred to the above and also contained a paragraph advising petitioners of such attachment, and the respondent was precluded from tendering a check to petitioners because of said writ. On May 25, 1959, petitioners herein filed an answer to the April 15, 1959, complaint, thereby making a general appearance. This appearance was made by counsel other than counsel for petitioners herein, and on October 5, 1959, counsel for petitioners herein was substituted in place and in the stead of the answering attorney. On this same date petitioners filed a motion to quash levy of writ of attachment. On October 16, 1959, respondent herein commenced another action based on other grounds against petitioners, and writs of attachment and garnishment were issued, and once again served upon Nevada Savings and Loan Association. In one case respondent attached not only credits and personal property of petitioners, but also attached and garnished the debt owing from Nevada Savings and Loan Association to petitioners by reason of the repurchase of the petitioners' stock in said association.

On October 22, 1959, petitioners filed in the action commenced on April 15, 1959, a pleading entitled:

"DEFENDANTS' MOTION TO DISSOLVE, VACATE AND DISCHARGE THE ATTACHMENT AND GARNISHMENT PURPORTEDLY LEVIED BY SERVICE ON NEVADA SAVINGS AND LOAN ASSOCIATION ON APRIL 15, 1959."

In the action commenced on October 16, 1959, petitioners filed also on October 22, 1959, a pleading entitled:

"SPECIAL APPEARANCE BY DEFENDANTS FOR A MOTION TO DISSOLVE, VACATE AND DISCHARGE THE ATTACHMENT AND GARNISHMENT PURPORTEDLY LEVIED BY SERVICE ON NEVADA SAVINGS AND LOAN ASSOCIATION ON OCTOBER 19, 1959."

The latter pleading was referred to in petitioners' petition at page 3.

The point of significance is that the above pleading concerning the April 15, 1959, attachment did not make reference to a special appearance. This is obvious for the reason indicated above, that petitioners filed an answer in that particular action. The special appearance pleading referred to at page 3 of petitioners' petition is argued as directed to the attachment of stock certificates; however, the attachment and garnishment levied October 19, 1959, in the October 16, 1959, action was levied upon a debt only, as referred to above. In other words, petitioners have argued throughout their petition that there was a failure to seize stock certificates on October 19, 1959, when in fact that question was not even involved.

It is worthy of note, we think, that the Supreme Court of the State of Nevada made reference to this in that portion of the quotation conveniently avoided by counsel for petitioners at page 3 of his brief. The Supreme Court of the State of Nevada stated as follows in its opinion:

> "On the oral argument herein, counsel for respondent conceded that the purported levy on the stock was ineffectual because the stock certificates were not seized by the officer making the levy or surrendered to Nevada Savings and Loan Association which issued it, or the holder had not been enjoined, as required by NRS 79.170, but this concession loses significance in view of the lower court's decision that Nevada Savings and Loan Association was the owner of the stock and that *the purchase price thereof in the hands of said association at the time of the levy was attachable.*" (Emphasis added.)

The Eighth Judicial District Court of the State of Nevada denied both motions upon the grounds and for the reasons set forth and quoted in the opinion of the Supreme Court of the State of Nevada. Among other things, the trial court and the Supreme Court of the State of Nevada noted that the statutory grounds for discharge

of attachment, as found in 31.200 N.R.S., had not been alleged or proven. This statute is cited in full in the opinion of the Supreme Court of the State of Nevada.

ARGUMENT

I.

The federal constitutional question was not raised by the judgment of the Supreme Court of the State of Nevada, but appeared, if at all, at the first instance in the Trial Court.

Petitioners based their jurisdictional standing before this Honorable Court solely upon the premise that it was the judgment of the Supreme Court of the State of Nevada which raised an alleged Federal constitutional question, rather than the judgment of the Eighth Judicial District Court, Clark County, State of Nevada.

Respondents respectfully direct this Honorable Court to the statement of petitioners, found at page 3 of their petition, where reference is made to a certain verified motion which was filed in the Eighth Judicial District Court of the State of Nevada, entitled, "Special appearance by defendant for a motion to dissolve, vacate and discharge the attachment and garnishment purportedly levied by service on Nevada Savings and Loan Association on October 19, 1959". The matter of paramount significance is that the very motion, and the various facets of that motion, were presented to the State District Court, as well as to the Supreme Court of the State of Nevada, and respondents respectfully submit that if any Federal constitutional questions were raised in the instant cases by reason of the allegations of said motion, namely, that the petitioners resided in the State of California and that the stock certificates in question were physically outside of the terri-

torial jurisdiction of the State of Nevada, these questions were present at the first instance in the State District Court. It has been a long standing rule of this Honorable Court that a Federal constitutional question not raised in the first instance and thereafter decided by the Appellate Court will not be considered on appeal to the Supreme Court of the United States.

Wabash Railroad Company v. *City of St. Louis*, 64 F. 2d. 921; cert. denied 290 U. S. 668, 78 L. Ed. 577;

Shelley v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 1161;

Polizzi v. *Cowles Magazines, Inc.*, 345 U. S. 663, 97 L. Ed. 1331.

II.

Rules of practice prescribed by the respective courts govern as to the timeliness of a federal constitutional question.

The opening statement by petitioners concedes that the Federal constitutional question was first raised in the petition for rehearing in the Supreme Court of the State of Nevada. The Supreme Court of the State of Nevada in denying the petition for rehearing was directed, by respondents, to the 1960 Nevada case, *In the Matter of the Petition of Eugene J. Lorinet for Leave to Take the Nevada Bar Examination in September 1959*, 349 P.2d. 149, wherein the Supreme Court of the State of Nevada stated with reference to appellant raising a Federal constitutional question that such questions are not considered when raised for the first time in a petition for rehearing.

Petitioners herein cite in support of their position that it was the opinion of the Supreme Court of the State of Nevada which raised the Federal constitutional question

and rely upon the case of *Tidal Oil Company* v. *Flanagan*, 263 U. S. 444, in which case the defendant in error had moved to dismiss because the Federal constitutional questions were raised too late, for reason that they were raised for the first time in the petition for rehearing which the court denied without an opinion. It is worthy of note, however, that this Honorable Court held that the record did not sustain this ground because the Federal questions appeared in the assignment of errors filed on the appeal from the District Court to the State Supreme Court.

The Supreme Court of the State of Nevada, having as one of its rules of procedure that Federal constitutional questions raised for the first time on a motion for rehearing will not be considered, it has been the long established rule of this Honorable Court that the rules of practice prescribed by the respective state courts govern, and where a Federal constitutional question was not asserted at the time and in the manner prescribed by the state court's established rules of practice, the refusal of the State Supreme Court is not a denial of a Federal right which this Honorable Court will review. This statement is clearly presented in *Atlantic Coast Line Rail Road Company* v. *Lizzie M. Mims*, 242 U. S. 532, 61 L. Ed. 476, as follows:

> "While it is true that a substantive Federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a Federal right not having been asserted at a time and in a manner calling for the consideration of it by the state supreme court under its established system of practice and pleading, the refusal of the trial court and of the supreme court to admit the testimony tendered in support of such claim is not a denial of a Federal right which (537) this court can review."

This Honorable Court held to like effect in *John* v. *Paullin*, 231 U. S. 581, 583.

III.

Where the opinion of the Supreme Court is based on grounds other than a federal constitutional question, even if such question is raised, the United States Supreme Court will accept this decision whether right or wrong.

Petitioners make various assertions and contentions at pages 3 and 4 of their petition as to what the opinion of the Supreme Court of the State of Nevada held. Respondents respectfully submit that such assertions and contentions are without merit. The Supreme Court of the State of Nevada held only that where the reviewing court was without sufficient record before it to show what evidence was considered by the lower court in arriving at its conclusion, that the reviewing court would assume that the lower court's conclusions were supported by competent evidence. In the footnote to page 11 of the opinion of the Supreme Court of Nevada, the court clearly set this out while referring to Rule 20 of the Nevada District Court Rules, which is found in Appendix A. It is worthy of note that the appellants in the Nevada Supreme Court, petitioners herein, designated the contents of the record on appeal upon which they relied in that court. Respondent made no counter designations and, therefore, the record was insufficient, as indicated by the Supreme Court of the State of Nevada. The insufficiency of the record was brought about by the petitioners' own doing.

An analogy can be drawn between this situation and that contained in the case of *Matheson v. State Bank of Alabama*, 48 U. S. 260, 12 L. Ed. 692, wherein this Honorable Court held where no transcript of the record was filed in the State Appellate Court, review by this Court would not lie and that the intention of parties to raise a constitutional question is not enough; that the questions must actually be raised and decided in the highest court of the state before review will lie.

Even if we concede for the sake of argument that petitioners had properly raised possible Federal constitutional questions on original argument in the Supreme Court of the State of Nevada, the Nevada Supreme Court's decision, being based upon grounds other than the Federal constitutional question, whether such decision was right or wrong, is accepted by this Honorable Court, and this Court so held in denying writs of certiorari to the Supreme Court of the State of Nevada wherein a very nearly identical situation as that in the instant case was presented to this Court. *Nickel* v. *Cole*, *Nickel* v. *State of Nevada*, 256 U. S. 222, 65 L. Ed. 901.

Question Presented

Respondent respectfully submits that the sole question presented herein is whether or not the proper jurisdictional grounds have been raised to give this Honorable Court jurisdiction to grant a writ of certiorari to the Supreme Court of the State of Nevada.

Petitioners argue numerous and sundry issues and statutes at page 6 through page 12 of their petition, all of which are without merit for the reasons set forth in respondent's argument above.

CONCLUSION

Respondent respectfully submits that, based upon the foregoing reasons, and arguments, petitioners' petition for a writ of certiorari should not be granted.

Respectfully submitted,

Morse, Graves & Compton and James H. Phillips
By Madison B. Graves
Counsel for Respondent

APPENDIX A

31.060 Execution of writ of attachment: Manner in which property is to be attached. The sheriff to whom the writ is directed and delivered shall execute the same without delay, and if the undertaking mentioned in NRS 31.040 be not given, as follows:

1. Real property shall be attached by leaving a copy of the writ with the occupant thereof, or, if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the recorder of the county.

2. Personal property capable of manual delivery shall be attached by taking it into custody.

3. Subject to the provisions of NRS 79.170, stock or shares, or interest in stock or shares, of any corporation or company, domestic or foreign, shall be attached by leaving with the president or other head of the corporation or company, or secretary, cashier or managing agent thereof, a copy of the writ and a notice stating the stock or interest of the defendant is attached in pursuance of such writ. If the corporation or company is doing business in this state and has no president or other head, or secretary, cashier or managing agent in this state with whom a copy of the writ and notice may be left, the attachment may be made by service of the writ and notice in the manner allowed for the service of summons. Any transfer or attempt to transfer stock so attached shall be deemed a contempt of court and punished accordingly.

4. Debts and credits, due or to become due, and other personal property, not capable of manual delivery, shall be attached by leaving with the person owing such debts, or having in his possession, or under his control, such

credits or other personal property, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ.

31.200. Grounds for discharge of attachment.

1. The defendant may also, at any time before trial, apply upon motion, upon reasonable notice to the plaintiff, to the court in which the action is brought or to the judge thereof, for a discharge of the attachment on the following grounds:

(a) That the writ was improperly issued.

(b) That the property levied upon is exempt from execution.

(c) That the levy is excessive.

2. If the court or the judge thereof on the hearing of such motion shall find that any of the grounds stated in subsection 1 exist, the attachment and levy thereof shall be discharged. If the motion is based upon paragraph (c) of subsection 1 only, and the same is found to exist, the discharge of attachment shall be only as to the excess.

31.240. Writ of garnishment may issue at time of issuance of writ of attachment or later. At the time of issuing a writ of attachment in an action, or at any time thereafter, the plaintiff may have a writ of garnishment issue, and thereupon attach the credits, effects, debts, choses in action and other personal property of the defendant in the possession or under the control of any third person, as garnishee, for the security of any judgment the plaintiff may recover in such action against the defendant.

Rule 20. Motions: Procedure for making motions; affidavits; renewal, rehearing of motions.

1. Upon reading and filing the notice of motion, with due proof of the service of the same, and of the papers mentioned therein, if no one appears to oppose the motion, the moving party shall be entitled to have the motion decided.

2. Upon the hearing, the affidavits to be used by either party shall be endorsed and filed before the affidavits shall be used.

3. The manner of making motions shall be as follows:

(a) Unless otherwise ordered by the court, the moving party shall read the moving papers, or state the contents thereof, or introduce his oral evidence.

(b) The party opposing shall then read or state the contents of his opposing papers, or introduce his oral evidence.

(c) The moving party may then read his rebutting papers, or introduce oral evidence, if admissible under the rules of practice.

(d) The counsel for the moving party shall make his argument, to be followed by the counsel of the opposing party, and the counsel for the moving party may reply.

APPENDIX B-1

(Oral Decision of Eighth Judicial District)

IN THE

EIGHTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

Nos. 96133 and 99495

SIERRA CONSTRUCTION CORPORATION, a Nevada Corporation,
Plaintiff,

vs.

HERBERT E. NELSON and WALLACE R. NELSON,
Defendants.

I think the argument is highly technical. I think the transaction by the letters is a closed transaction. I think now the stock belongs to the Nevada Savings and Loan Association. I think they would have a right to transfer that stock on their books whether they had actual possession of the stock certificate or not.

I think when the Nelsons made that offer to sell the stock to the Nevada Savings and Loan Association and Nevada Savings and Loan Association has by Resolution on their minutes accepted it that transaction became closed.

The only difference would be the payment of the money. So, they wrote a check but they could not pay the money because it was attached; so, inasmuch as it was a closed transaction I think the money was attachable.

Now, the next question is whether or not the writ of attachment contains a sufficient allegation as to owing the debt and I think it is a rule you have to comply with the law in every respect.

The law is highly technical. I think the Association holds the money now that belongs to the Nelsons.

I cannot see any sufficient grounds to discharge or dissolve the attachment.

Was the writ improperly issued? I don't think so.

Was the property levied upon exempt from execution? There was nothing shown as to an exemption.

Was the levy excessive? Nothing was shown.

So the motion to quash the levy or writ of attachment and the motion to dissolve and vacate and discharge the attachment and garnishment purportedly levied by service on Nevada Savings and Loan Association be denied.

APPENDIX B-2

(Opinion of Supreme Court of the State of Nevada)

IN THE

SUPREME COURT

OF THE STATE OF NEVADA

HERBERT E. NELSON and WALLACE R. NELSON,
Appellants,

v.

SIERRA CONSTRUCTION CORPORATION, a Nevada Corporation,
Respondent.

Nos. 4262 and 4263

[Filed May 16, 1960]

Appeals from the Eighth Judicial District Court, Clark County; A. S. Henderson, Judge, Department No. 2.

Affirmed on both appeals.

MORTON GALANE, of Las Vegas, for Appellants.

MORSE, GRAVES and COMPTON and JAMES H. PHILLIPS, of Las Vegas, for Respondent.

OPINION

By the Court, McNAMEE, C. J.:

Two cases of the same title have been consolidated for oral argument on appeal. The questions involved pertain to each case except as hereinafter noted.

Appeal is from an order refusing to dissolve an attachment.

In case number 4262 the court had personal jurisdiction over appellants by reason of their appearance in said action. They made the following three motions in the court below:

1. Motion to quash the levy of a writ of attachment, filed October 5, 1959;

2. Motion to dissolve, vacate, and discharge the attachment and garnishment purportedly levied by service on Nevada Savings and Loan Association on April 15, 1959, filed October 22, 1959;

3. Motion to dissolve, vacate, and discharge the attachment and garnishment purportedly levied by service on Nevada Savings and Loan Association on October 19, 1959, filed October 22, 1959.

The grounds for motion number 1 were (a) the sheriff failed to serve upon the Nevada Savings and Loan Association a notice that the debts owing by it to appellants or the credits or other personal property in possession or under its control belonging to the defendants were attached in pursuance of said writ as required by subsection 4 of NRS 31.060; (b) the sheriff failed to serve upon the Nevada Savings and Loan Association a notice stating the stock or interest of the defendants was attached in pursuance of the writ of attachment as required by subsection 3 of NRS 31.060; (c) the sheriff failed to actually seize stock certificates, and the certificates had not been surrendered to Nevada Savings and Loan Association and their transfer to the holder had not been enjoined as required by NRS 78.170; (d) the contract whereby Nevada Savings and Loan Association would pay cash for the stock of the defendants was not attachable.

The grounds for motion number 2 were (a) the amount payable to appellants by Nevada Savings and Loan Association under contract contemplates a cash transaction not

a debtor-creditor relationship and was not subject to attachment and garnishment; (b) the sheriff in serving the writ of attachment on Nevada Savings and Loan Association failed to accompany it with any notice that the debts owing by it to the appellants or the credits or other personal property in its possession or under its control belonging to the defendants were attached in pursuance of said writ of attachment; (c) the sheriff served a writ of attachment to Nevada Savings and Loan Association but failed to accompany it with any notice stating that the stock or interest of the defendants was attached in pursuance of said writ of attachment; (d) the sheriff failed to actually seize any of the stock certificates and the certificates had not been surrendered to the Nevada Savings and Loan Association and their transfer by the holder have not been enjoined; (e) Marilynn D Nelson and Mary Virginia Nelson were not joined as parties defendant in the main action and the records of the Nevada Savings and Loan Association indicate that they have an interest as joint tenants in the stock purportedly levied upon.

The grounds for motion number 3 were (a) the amount payable by Nevada Savings and Loan Association under contract contemplates a cash transaction not a debtor-creditor relationship and is not subject to attachment and garnishment; (b) the sheriff failed to actually seize any of the stock certificates and the certificates had not been surrendered to Nevada Savings and Loan Association and their transfer by the holder had not been enjoined; (c) Marilynn D. Nelson and Mary Virginia Nelson were not joined as parties defendant in the main action and the records of the Nevada Savings and Loan Association indicate that they have an interest as joint tenants in the stock purportedly levied upon.

In case number 4263 appellants were not personally served in this action and entered no general appearance therein. By special appearance they filed a motion to dissolve, vacate, and discharge the attachment and garnish-

ment purportedly levied by service on Nevada Savings and Loan Association on October 19, 1959.

The grounds for the motion in this case were (a) the amount payable to appellants by Nevada Savings and Loan Association under contract contemplated a cash transaction not a debtor-creditor relationship and is not subject to attachment or garnishment; (b) the sheriff failed to actually seize any of the stock certificates and the certificates had not been surrendered to Nevada Savings and Loan Association and their transfer by the holder had not been enjoined; (c) Marilynn D. Nelson and Mary Virginia Nelson were not joined as parties defendant in the main action and the records of the Nevada Savings and Loan Association indicate that they have an interest as joint tenants in the stock purportedly levied upon.

The three motions in case number 4262 and the one motion in case number 4263 were consolidated for argument in the lower court and all four motions were denied on October 26, 1959 and a written order to this effect was filed in the cases. Appeal in each case is from "the order refusing to dissolve an attachment made and entered on the 26th day of October 1959."

The statutory grounds for discharge of attachment are found in NRS 31.200 which reads as follows:

"1. The defendant may also, at any time before trial, apply upon motion, upon reasonable notice to the plaintiff, to the court in which the action is brought or to the judge thereof, for a discharge of the attachment on the following grounds:

(a) That the writ was improperly issued.

(b) That the property levied upon is exempt from execution.

(c) That the levy is excessive.

"2. If the court or the judge thereof on the hearing of such motion shall find that any of the grounds stated

in subsection 1 exist, the attachment and levy thereof shall be discharged. If the motion is based upon paragraph (c) of subsection 1 only, and the same is found to exist, the discharge of attachment shall be only as to the excess."

It is apparent from the foregoing that none of the grounds stated in appellants' several motions for discharge of attachment was one of the statutory grounds specified in NRS 31.200. Each of the grounds upon which the motions were based pertains to the improper levy of the writ as distinguished from an improper issue thereof.

The record on appeal does not contain any of the proceedings which took place at the hearing on said motions other than the oral decision of the court wherein the learned judge thereof stated:

"I think the argument is highly technical. I think the transaction by the letters is a closed transaction. I think now the stock belongs to the Nevada Savings and Loan Association. I think they would have a right to transfer that stock on their books whether they had actual possession of the stock certificate or not.

"I think when the Nelsons made that offer to sell the stock to the Nevada Savings and Loan Association and Nevada Savings and Loan Association has by Resolution on their minutes accepted it that transaction became closed.

"The only difference would be the payment of the money. So, they wrote a check but they could not pay the money because it was attached; so, inasmuch as it was a closed transaction I think the money was attachable.

"Now, the next question is whether or not the writ of attachment contains a sufficient allegation as to owing the debt and I think it is a rule you have to comply with the law in every respect.

"The law is highly technical. I think the Association holds the money now that belongs to the Nelsons.

"I cannot see any sufficient grounds to discharge or dissolve the attachment.

"Was the writ improperly issued? I don't think so.

"Was the property levied upon exempt from execution? There was nothing shown as to an exemption.

"Was the levy excessive? Nothing was shown.

"So the motion to quash the levy or writ of attachment and the motion to dissolve and vacate and discharge the attachment and garnishment purportedly levied by service on Nevada Savings and Loan Association be denied."

What evidence was considered by the court, if any at all, in support of or in opposition to the grounds upon which appellants' motions were based does not appear from the record. We have only the court's bald statement in said decision, to wit, "I cannot see any sufficient grounds to discharge or dissolve the attachment."[1]

Whether it would have been proper for the court below on a motion for discharge of attachment to grant a discharge on grounds other than the three statutory grounds is a question unnecessary for us to decide on these appeals. The court refused to grant the motions and nothing appears in the records on appeal from which this court can determine that error was committed.

---

[1] The opening sentence of the quoted oral decision of the district judge indicates that the decision was rendered immediately following oral argument and apparently immediately following the reply argument of the movant. What preceded the argument is left to conjecture. Under Rule 20 of the District Court Rules, regulating procedure on motions, the moving party reads his moving papers or introduces oral evidence. The party opposing reads his opposing papers or introduces his oral evidence. The moving party then proceeds in like manner in rebuttal. Counsel then make their respective arguments. Not only was the hearing of the motions apparently unreported, but the record is devoid of even the clerk's court minutes. Appellants' designation of content of the record on appeal designates the pleadings, the motions, the orders of court, and "all minutes of court on each and every hearing of any matter or motion presented herein." Respondent made no counter designation. No depositions appear nor any evidence by way of affidavits or otherwise.

On the oral argument herein, counsel for respondent conceded that the purported levy on the stock was ineffectual because the stock certificates were not seized by the officer making the levy or surrendered to Nevada Savings and Loan Association which issued it, or the holder had not been enjoined, as required by NRS 79.170, but this concession loses significance in view of the lower court's decision that Nevada Savings and Loan Association was the owner of the stock and that the purchase price therefor in the hands of said association at the time of the levy was attachable.

We do not know what evidence was considered by the lower court which resulted in this conclusion and in the absence thereof we must assume that the lower court's conclusion was supported by competent evidence. State ex rel. Lyon v. Lyon, 73 Nev. —, 346 P. 2d 709.

The order appealed from is affirmed in each case.

Badt and Pike, JJ., concur.

APPENDIX B-3

(Order of Supreme Court of State of Nevada Denying the Hearing)

IN THE SUPREME COURT OF THE STATE OF NEVADA

—o—

HERBERT E. NELSON and WALLACE R. NELSON,
Appellants,

v.

SIERRA CONSTRUCTION CORPORATION, a Nevada Corporation,
Respondent.

—o—

Nos. 4262 and 4263

MORTON GALANE, of Las Vegas, for Appellants.

MORSE, GRAVES AND COMPTON and JAMES H. PHILLIPS, of Las Vegas, for Respondent.

Per Curiam:
Rehearing denied.

Done at Carson City, Nevada, this 3rd day of June, 1960.

McNAMEE, *C. J.*
BADT, *J.*
PIKE, *J.*